1.1 Federal Employers' Liability Act, 45 U.S.C. §§ 51-60

In order to prevail on [his/her] claim, [plaintiff] must establish each of the following things by a preponderance of the evidence:

> First, that [he/she] was [defendant]'s employee and that [defendant] was a common carrier by railroad engaged in interstate or foreign commerce;
>
> Second, that a part of [his/her] duties furthered interstate or foreign commerce or directly or closely and substantially affected such commerce in any way;
>
> Third, that at the time of [his/her] injury [he/she] was acting in the course of [his/her] employment;
>
> Fourth, that [defendant] was negligent; and
>
> Fifth, that [defendant]'s negligence was a legal cause of the injury sustained by [plaintiff].

A railroad corporation like [defendant] acts through its officers, agents and employees, and is responsible for any negligence by them when they are acting within the scope of their employment.

"Negligence" is the failure to use reasonable care or the failure to take reasonable steps to furnish a reasonably safe place to work with reasonably safe tools and equipment. Reasonable care is that degree of care that a reasonably careful railroad would use under similar circumstances to prevent reasonably foreseeable harm. To find negligence, you must find that harm was reasonably foreseeable. Negligence may consist either in doing something that a reasonably careful railroad would not do under similar circumstances, or in failing to do something that a reasonably careful railroad would do under similar circumstances. The fact that an accident may have happened does not alone permit you to infer that it was caused by negligence; a railroad does not guarantee its employees' safety.

For purposes of this claim, negligence is a "legal" cause of injury if it plays any part, no matter how small, in bringing about or actually causing the injury. So, if you should find from the evidence that negligence of [defendant] contributed in any way toward any injury suffered by [plaintiff], then [plaintiff]'s injury was legally caused by [defendant]'s negligence. Negligence may be a legal cause of injury even though it operates in combination with the act of another, some natural cause, or some other cause.

If a preponderance of the evidence does not support [plaintiff]'s claim that [defendant]'s negligence legally caused [his/her] injury, then your verdict will be for [defendant]. If, however, a preponderance of the evidence does support [plaintiff]'s claim, you will then consider the defense raised by [defendant].

[Defendant] contends that [plaintiff] was [himself/herself] negligent and that such negligence was a legal cause of [his/her] injury. This is a defensive claim and the burden of proving this claim is upon [defendant], who must establish by a preponderance of the evidence:

First, that [plaintiff] was also negligent; and

Second, that [plaintiff]'s negligence was a legal cause of [his/her] injury.

If you find in favor of [defendant] on this defense, that will not prevent recovery by [plaintiff]. It only reduces the amount of [plaintiff]'s recovery. In other words, if you find that the accident was due partly to the fault of [plaintiff]—that [his/her] own negligence was, for example, 10% responsible for [his/her] injury—then you will fill in that percentage as your finding on the special verdict form. I will then reduce [plaintiff]'s total damages by the percentage that you insert. Of course, by using the number 10% as an example, I do not mean to suggest to you any specific figure. If you find that [plaintiff] was negligent, you might find any amount from 1% to 99%.

DAMAGES

I am now going to instruct you on damages in the event you should reach that issue. The fact that I instruct you on damages does not indicate any view by me that you should or should not find for [plaintiff] on liability. If you should award damages, the amount you award will not be subject to federal or state income taxes.

[Plaintiff] bears the burden of proof to show both the existence and the amount of [his/her] damages by a preponderance of the evidence. But this does not mean that [he/she] must prove the precise amount of [his/her] damages to a mathematical certainty. What it means is that [he/she] must satisfy you as to the amount of damages that is fair, just and reasonable under all the circumstances. Damages must not be enlarged so as to constitute either a gift or a windfall to [plaintiff] or a punishment or penalty to [defendant]. The only purpose of damages is to award reasonable compensation. You must not award speculative damages, that is, damages for future losses that, although they may be possible, are wholly remote or conjectural.

It is the duty of one who is injured to exercise reasonable care to reduce or mitigate the damages resulting from the injury—in other words, to take such steps as are reasonable and prudent to alleviate the injury or to seek out or take advantage of a business or employment opportunity that was reasonably available to [him/her] under all the circumstances shown by the evidence. On this issue of mitigation the burden of proof is on [defendant] to show by a preponderance of the evidence that [plaintiff] has failed to mitigate damages. You shall not award any damages to [plaintiff] that you find [he/she] could reasonably have avoided.

[If you find that [plaintiff] had a pre-existing condition that made [him/her] more susceptible to injury than a person in good health, [defendant] is responsible for the injuries suffered by [plaintiff] as a result of [defendant]'s negligence even if those injuries are greater than a person in good health would have suffered under the same circumstances.]

[[Defendant] is not liable for [plaintiff]'s damages caused by a pre-existing condition. But if you find that [defendant] negligently caused further injury or aggravation to a pre-existing condition, [plaintiff] is entitled to compensation for that further injury or aggravation. If you cannot separate the damages caused by the pre-existing condition from that caused by [defendant]'s negligence, then [defendant] is liable for all [plaintiff]'s damages.]

The elements of damage may include:

1. Reasonable Medical Expenses. The parties have stipulated that reasonable medical expenses amount to $_____.

2. Lost Wages and Earning Power. You may award [plaintiff] a sum to compensate [him/her] for income that [he/she] has lost, plus a sum to compensate [him/her] for any loss of earning power that you find from the evidence [he/she] will probably suffer in the future, as a result of [defendant]'s negligence.

In determining the amount of future loss, you should compare what [plaintiff]'s health, physical ability and earning power were before the accident with what they are now; the nature and severity of [his/her] injuries; the expected duration of [his/her] injuries; and the extent to which [his/her] condition may improve or deteriorate in the future. The objective is to determine the injuries' effect, if any, on future earning capacity, and the present value of any loss of future earning power that you find [plaintiff] will probably suffer in the future. In that connection, you should consider [plaintiff]'s work life expectancy, taking into account [his/her] occupation, [his/her] habits, [his/her] past health record, [his/her] state of health at the time of the accident and [his/her] employment history. Work life expectancy is that period of time that you expect [plaintiff] would have continued to work, given [his/her] age, health, occupation and education.

If you should find that the evidence establishes a reasonable likelihood of a loss of future earnings, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

[You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.]

3. Pain and Suffering and Mental Anguish. You may award a sum to compensate [plaintiff] reasonably for any pain, suffering, mental anguish and loss of enjoyment of life that you find [defendant]'s negligence has caused [him/her] to suffer and will probably cause [him/her] to suffer in the future. Even though it is obviously difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can,

not from a personal point of view, but from a fair and impartial point of view, attempting to come to a conclusion that will be fair and just to all of the parties.

Comment

(1) This instruction does not provide definitions for "employee," "course of employment," "common carrier" or "interstate commerce" because parties generally stipulate to these requirements.

For "employee" see 45 U.S.C. § 51 (1994); Kelley v. S. Pac. Co., 419 U.S. 318, 322-32 (1974); Baker v. Texas & Pac. Ry. Co., 359 U.S. 227 (1959) (per curiam) (citing Restatement (Second) of Agency §§ 220, 227 and holding that employment is a factual question for the jury); Reed v. Pennsylvania R.R. Co., 351 U.S. 502, 505-07 (1956); S. Pac. Co. v. Gileo, 351 U.S. 493, 496-501 (1956); Metro. Coal Co., Inc. v. Johnson, 265 F.2d 173, 177-78 (1st Cir. 1959).

For "course of employment" see Erie R.R. Co. v. Winfield, 244 U.S. 170, 172-73 (1917); Getty v. Boston and Maine Corp., 505 F.2d 1226, 1228 (1st Cir. 1974); Metro. Coal, 265 F.2d at 177-78.

For "common carrier" see 45 U.S.C. § 57 (1994); Edwards v. Pac. Fruit Express Co., 390 U.S. 538, 540 (1968).

For "interstate commerce" see 45 U.S.C. § 51; Philadelphia & Reading Ry. Co. v. Hancock, 253 U.S. 284, 286 (1920).

For a discussion of who is an "agent" of the employer, see Sinkler v. Missouri Pac. R.R. Co., 356 U.S. 326, 331-32 (1958).

(2) The fellow servant rule, contributory negligence, and assumption of risk have all been abolished in FELA cases. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542-43 (1994); see also 45 U.S.C. § 51 (fellow servant rule); 45 U.S.C. § 53 (1994) (contributory negligence); 45 U.S.C. § 54 (1994) (assumption of risk). An instruction on the non-existence of assumption of risk is unnecessary. Porter v. Bangor & Aroostook R.R. Co., 75 F.3d 70, 72 (1st Cir. 1996).

(3) In order to prove negligence, the cases sometimes say that the plaintiff must prove duty, breach, damages, causation and foreseeability. Stevens v. Bangor & Aroostook R.R. Co., 97 F.3d 594, 598 (1st Cir. 1996); Robert v. Consol. Rail Corp., 832 F.2d 3, 6 (1st Cir. 1987).

Duty is omitted from the instruction because duty is generally an issue for the court, and an employer is always required to exercise reasonable care for its employees' safety while in the course of their employment. Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1, 7 (1963); Bailey v. Cent. Vermont Ry., Inc., 319 U.S. 350, 352-53 (1943).

On causation, "'the test . . . is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" Gottshall, 512 U.S. at 543 (quoting Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506 (1957)).

On foreseeability, the defendant is required to exercise reasonable care to prevent those harms that are foreseeable. Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 118 (1963). According to Gallick, "reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." 372 U.S. at 117. A defendant's duty to exercise due care

is limited to those conditions of which he/she/it is aware or should be aware. Shenker, 374 U.S. at 7-8.

Foreseeable danger may include intentional and criminal conduct. Harrison v. Missouri Pac. R.R. Co., 372 U.S. 248, 249 (1963) (per curiam) (quoting Lillie v. Thompson, 332 U.S. 459, 462 (1947)); Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562 n.8 (1987).

(4) There is no primary duty rule in FELA cases. Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 63-64 (1943). Strangely, the First Circuit continues to recognize the rule in Jones Act cases, see, e.g., Wilson v. Maritime Overseas Corp., 150 F.3d 1, 11 (1st Cir. 1998), even though the Jones Act incorporates FELA's provisions unaltered. Kernan v. American Dredging Co., 355 U.S. 426, 431 (1958).

(5) According to the First Circuit, FELA incorporates the "eggshell skull" rule. Stevens, 97 F.3d at 602 n.8. A defendant takes its victim as it finds him or her. See generally Figueroa-Torres v. Toledo-Davila, 232 F.3d 270, 274-76 (1st Cir. 2000). If the defendant aggravates a pre-existing injury, the defendant is liable only for the additional increment caused by its negligence and not for the pain and impairment that the plaintiff would have suffered absent defendant's negligent act. Stevens, 97 F.3d at 601. If the factfinder cannot separate injuries caused or exacerbated by the accident from those resulting from a pre-existing condition, the defendant is liable for all such injuries. Id. at 603. The bracketed instructions borrow heavily from those approved in Stevens. If post-accident health problems arise from another source, a defendant can use them to reduce the damages award. "In FELA cases plaintiff must prove pre-injury and post-injury earning potential." Id. at 599.

(6) In addition to accidental injury and death, occupational diseases are compensable under the statute. Urie v. Thompson, 337 U.S. 163, 186-87 (1949).

(7) Damages for negligent infliction of emotional distress are cognizable, but only if suffered within the zone of danger. Gottshall, 512 U.S. at 549-50, 554-57; Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997). That means that recovery is limited to "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." Gottshall, 512 U.S. at 547-48. Exposure without symptoms—"simple physical contact with a substance that might cause a disease at a substantially later time"—is not enough, Metro-North, 521 US. at 430, even for medical monitoring costs. Id. at 444. These Supreme Court cases requiring physical impact or immediate apprehension of physical impact implicitly confirm—albeit in different reasoning—earlier First Circuit rulings denying recovery for work stress-induced heart attacks. See, e.g., Robert v. Consol. Rail Corp., 832 F.2d 3 (1st Cir. 1987); Moody v. Maine Central R.R. Co., 823 F.3d 693 (1st Cir. 1987). Further development of this doctrine is anticipated. Norfolk & Western Ry. Co. v. Ayers, 70 U.S.L.W. 3613 (2002) (granting cert.).

(8) FELA precludes claims for loss of parental and spousal society in non-fatal injury cases. Horsley v. Mobil Oil Corp., 15 F.3d 200, 202 (1st Cir. 1994) (citing New York Cent. & Hudson River R.R. Co. v. Tonsellito, 244 U.S. 360, 362 (1917)).

(9) A wrongful death claim for pecuniary damages can be made under FELA. 45 U.S.C. § 51; Michigan Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 68-74 (1913). The covered employee's

cause of action under FELA survives his or her death. 45 U.S.C. § 59 (1994); St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 657-58 (1915). Survival damages are limited to the deceased's loss and suffering while he or she lived. Craft, 237 U.S. at 657-58. The list of who may bring a wrongful death or survival suit is provided in the statute. 45 U.S.C. § 51 (wrongful death); 45 U.S.C. § 59 (survival); see also Poff v. Pennsylvania R.R. Co., 327 U.S. 399, 400 (1946) (assuming without deciding that only one class of plaintiffs may recover; "members of the second or third class . . . are not entitled to recover if there survives a member of the prior class"); Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 493-96 (1916) (state law determines who is "next of kin"); Poff, 327 U.S. at 401 (dependent next of kin constitute a single class to which non-dependent next of kin do not belong).

(10) Any award of future earnings should be reduced to present value, and the jury must be instructed accordingly. Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916). The discount rate is determined by the jury. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 341 (1988); see also St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 412 (1985) (per curiam) (noting that the discount rate "should take into account inflation and other sources of wage increases as well as the rate of interest"). Notwithstanding inflationary factors, "[t]he discount rate should be based on the rate of interest that would be earned on 'the best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Kelly, 241 U.S. at 491). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; see also Kelly, 241 U.S. at 490-91; Conde v. Starlight I, Inc., 103 F.3d 210, 216 & n.8 (1st Cir. 1997) (suggesting six percent as an appropriate "market interest rate").

(11) Any award of past or future lost wages should be based upon after-tax earnings, and the jury should be allowed to consider evidence necessary for the calculation. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493-96 (1980). But FELA damage awards themselves are not taxable income. 26 U.S.C. § 104(a)(2) (2001); Liepelt, 444 U.S. at 496-98. Section 104(a)(2) excludes from taxation awards for both wage and non-wage income. Allred v. Maersk Line, Ltd., 35 F.3d 139, 142 (4th Cir. 1994). Therefore, an instruction that the damage award will not be taxed is required, see Liepelt, 444 U.S. at 498, at least if requested. Diefenbach v. Sheridan Transp., 229 F.3d 27, 32 (1st Cir. 2000) (failure to instruct not error if no objection).

(12) Prejudgment interest is unavailable under FELA. Morgan, 486 U.S. at 336-39.

(13) Punitive damages are not available in FELA cases. Horsley, 15 F.3d at 203.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

[PLAINTIFF]	)	
	)	
V.	)	**CIVIL NO. _____**
	)	
[DEFENDANT]	)	

SPECIAL VERDICT FORM
[Federal Employers' Liability Act Claim]

1. Do you find that [defendant] was negligent and that its negligence was a legal cause of [plaintiff]'s injuries?

   Yes _____ No _____

   If your answer to Question #1 is "yes," proceed to Question #2. Otherwise, answer no further questions.

2. What are the total damages caused by [defendant's] negligence?

   $_____

   Proceed to Question #3.

3. Were the injuries caused in part by [plaintiff]'s own negligence?

   Yes _____ No _____

   If your answer to Question #3 is "yes," answer Question #4. Otherwise, answer no further questions.

4. In what percentage did [plaintiff]'s negligence contribute to the injuries?

   _____%

Dated: _____, 200_

_____
Jury Foreperson